Supreme Court of the United States

October Term, 1948

No. 448

NATIONAL DISTILLERS' PRODUCTS CORPORATION, New York, New York,

Appellant,

vs.

C. EMORY GLANDER,
Tax Commissioner of Ohio,

Appellee.

REPLY BRIEF FOR APPELLANT

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INDEX

CASES CITED

OTHER AUTHORITIES

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This reply brief is directed to certain statements and arguments set forth in the brief of appellee which tend to confuse the issues presented by this appeal.

The Decisions of the Supreme Court of Ohio

At page 38 of his brief appellee states that "The present system of taxation in Ohio became effective for the taxable year 1932 and there have been no substantial changes since then." Beginning with page 15 it cites and discusses several decisions of the Supreme Court of the State of Ohio in an effort to show that there has been a long and consistent record of administrative and judicial construction of Sections 5328-1 and 5328-2 of the General Code of Ohio.

It is true that the statutes in question became effective for the taxable year 1932 and that there have been no substantial changes by legislative enactment.

Nevertheless, the decision of the Ohio Supreme Court in 1944 in *Ransom & Randolph Co.* v. *Evatt*, 142 O. S. 398, made a radical change in the interpretation and application of the statutes with respect to the taxation of accounts receivable for *ad valorem* property tax purposes. This change was just as effective as if it had been made by the legislature. The Court there held that the receivables of an Ohio corporation were *exempt* from taxation in Ohio if they resulted either from the sale of property by an agent having an office in another state or from the sale of property from a stock of goods maintained in another state, regardless of whether the avails of the receivables were used in the Ohio business or in the business generally.

Prior to this decision in the *Ransom & Randolph* case, the Ohio Board of Tax Appeals had consistently held that "before a business situs of accounts receivable and other intangible property, for purposes of taxation, could be given to a state other than the state of the domicil of the taxpayer, it must appear that such receivables or other intangible property not only arose in the conduct of the business of the taxpayer in such other states, but were therein so used as to become an integral part of the business carried on in such other state; and that it was not sufficient that such accounts receivable and other intangible property be used in the business generally by the taxpayer" (R. 17).

The above interpretation of the statute by the Board of Tax Appeals prevailed until 1944, when the Supreme Court of Ohio decided the *Ransom & Randolph* case (R. 17). *Prior to that date the State of Ohio had made no claim that appellant's accounts receivable were subject to this tax.*

The effect of the *Ransom & Randolph* case was to dispense with the ordinary common law rules for the determination of business situs and to substitute an arbitrary rule allegedly created by statute.

The Supreme Court of Ohio reaffirmed its position with respect to the taxation of accounts receivable owned by a resident, in *Haverfield Co.* v. *Evatt* (1944), 143 O. S. 58; but until the decision in the instant case on August 4, 1948, it had not applied the changed rule to the accounts receivable owned by a non-resident of Ohio. In fact, the instant case and the companion cases of *Wheeling Steel Corporation* and *United States Gypsum Company* are the only cases involving the situs of accounts receivable of non-residents which have been decided by the Ohio Supreme Court since 1932. They were decided in August, 1948 (R. 28).

From the foregoing it would appear that, contrary to the statement made by appellee in his brief, there have been radical and recent changes since 1932 in the Ohio system of taxing intangibles.

The State of Ohio now asserts the right to impose an *ad valorem* property tax on accounts receivable owned by a non-resident of the State, irrespective of where the avails were used, and whether or not such receivables were terms of interstate contracts not made in Ohio, provided the goods forwarded by the seller were from a stock in Ohio.

The Commerce Clause

An *ad valorem* property tax has been imposed upon all of appellant's accounts receivable arising out of orders filled by shipment from appellant's plant in Ohio. The goods were shipped to customers throughout the United States (R. 56). The fact that the record does not disclose what part of the receivables arose from sales to customers in Ohio and what part from sales to customers in

other states is not material. The fact is that the tax has been imposed upon all the accounts receivable, without apportionment between interstate and intrastate sales (R. 57).

The appellee states at pages 29-30 of his brief that there has been an apportionment of the receivables here involved and that appellant has consented to such apportionment. This statement is contrary to the stipulated facts, as the record (p. 57) shows that the appellee seeks to tax the receivables arising from all sales of appellant's products which were shipped from its plant and plant warehouses in Ohio both to customers in Ohio and to customers in other states.

The tax here imposed is in substance and practical effect a direct tax on the gross proceeds of receipts from interstate sales, and as such is an invalid direct tax on interstate commerce.

Freeman v. *Hewit*, 329 U. S. 249;
Adams Mfg. Co. v. *Storen*, 304 U. S. 307;
Gwin, etc., Inc. v. *Henneford*, 305 U. S. 434.

With respect to appellee's argument based upon the case of *International Harvester Corporation* v. *Evatt*, 329 U. S. 416, it would seem sufficient to point out that this case involved a franchise tax for the privilege of doing business in Ohio and in no way involved the right of the state to levy a direct personal property tax on intangibles as separate items of property.

The appellee's brief speaks in general terms of benefit and protection. Its language might apply to appellant's tangible property and franchise in Ohio, on all of which it pays the compensatory tax. But the language cannot apply to the intangibles here involved. Ohio can furnish to such transitory choses in action no service not equally available in every other state of the Union.

Due Process Clause

(1) The appellee in his brief refers to the case of *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, and quotes extensively therefrom. Appellee states that the decision of this Court therein is entirely favorable to him. He further states that the case held that the receivables of Wheeling Steel Corporation "arising from its sales and shipments from its Ohio plant and warehouses were subject to Ohio tax;" (pp. 36-38).

Appellee has plainly misconstrued the holding of this Court, since the validity of the Ohio assessment on the Wheeling Company's receivables was not an issue before the Court. On this point this Court said at page 215:

> "Upon this record the question before us is with regard to the constitutional validity of the tax as assessed in West Virginia and not as to the amount or validity of any tax assessed elsewhere."

Again at page 214 this Court said of the deduction of the Ohio assessment: "No question as to its propriety is before us on this record."

Whatever right Ohio might have to tax receivables having an actual and lawful situs in Ohio, Ohio has no right to tax receivables not shown to have such situs.

(2) At various places throughout his brief the appellee refers to the existence in Ohio of manufacturing plants, warehouses and other property owned by appellant. The ownership of such property is immaterial. The sole issue here is the right to tax certain specific items of property, that is, certain accounts receivable. The determination of that issue in no way depends upon the amount of other property owned by appellant in Ohio and taxed in Ohio. As said by this Court in *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193 (p. 212):

"Here, the tax is a property tax on the accounts receivable, as separate items of property, and these are not to be regarded as parts of the manufacturing plants where the goods sold are produced.

"Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one 'which allocates intangibles on the basis of tangible property owned and used in production of material for sale.' This is to confuse two distinct subjects of ad valorem property taxation, the accounts receivable which arise from sales and the manufacturing plants. The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale."

Equal Protection Clause

In his brief the appellee denies that the statute in question is, on its face, discriminatory, but concedes (p. 47) that it "is susceptible of an interpretation that perhaps could result in discrimination in that a domestic corporation would be favored over a foreign corporation."

That the statute is discriminatory on its face is apparent when it is considered that, if the appellant here were an Ohio corporation, the accounts receivable in question would be free from tax under the plain language of the statute. Therefore, the statute does discriminate against a foreign corporation because under identical facts, save for the place of corporate domicil, the accounts receivable of a domestic corporation are exempt from tax while those of a foreign corporation are subject to tax.

In his brief appellee states (p. 50) that the Ohio Supreme Court has not held an Ohio corporation exempt from tax on accounts receivable arising from orders accepted outside Ohio but filled from a stock of goods within

that state. It might well be added that by reason of the provisions of the Ohio statute the Ohio Court may never have occasion to consider such an issue. The statute clearly provides that, in the case of an Ohio corporation, accounts receivable arising from orders accepted without the state and filled by shipment from a stock of goods within the state are exempt from tax. It must be assumed that the Tax Commissioner will not disregard the plain language of the statute and attempt to impose a tax where he is clearly forbidden to do so. The discrimination of which appellant complains arises from the fact that the Tax Commissioner is required by the statute to impose a tax against a foreign corporation, but is prohibited under like circumstances from taxing a domestic corporation.

Comments on Certain Statements In Appellee's Brief

Page 2, paragraph 2. "Ad valorem intangible property tax on the amount of credits *in Ohio.*" This language of course assumes the entire point in issue in the case.

Page 4, paragraph 1. Reference is made herein to "prepaid intangible items" and such items are mentioned throughout the brief of the appellee. Prepaid intangible items are in no way involved in this case. There is no tax assessed in so far as this case is concerned upon prepaid intangible items of the appellant; and no prepaid intangible items are allocated to Ohio either in the stipulation of facts or in the return, which is a part of the record. Therefore reference to prepaid intangible items is unjustified and misleading.

Page 4, paragraph (a). Reference is made to "products stored" (in appellant's distilling and rectifying plant and plant warehouses) "after they had been blended, rec-

tified and bottled, or from products already bottled and stored at said plant and warehouses in Ohio." The record is specific to the effect that only bulk whiskey is "stored"; and this is stored only for aging purposes (R. 56, 57, Stipulation, paragraph 11).

Page 5, paragraph (e). This paragraph is misleading in its entirety in that it leaves the inference that all of the monies deposited to bank accounts in Ohio were proceeds of the accounts receivable involved in this case. The record is specific to the effect that, "Payroll checks for plant employees, including those employed at the plant of the corporation located at Carthage, Hamilton County, Ohio, are paid with funds on deposit in banks in the locality in which the plants are located. The funds for the payroll checking account for each plant are obtained through checks prepared and signed in the offices of the corporation in New York City. * * * The avails of the accounts receivable when deposited by the corporation in banks in New York City are commingled with other funds of the corporation on deposit in that city, and which commingled funds are used by the corporation in the operation of its business throughout the United States, including the State of Ohio." (R. 52, Stipulation, paragraph 3).

Page 5, paragraph (g). The decision of the Supreme Court of Ohio in this very case is its first decision dealing in any way with accounts receivable of a foreign corporation in Ohio. The "line of decisions of a number of years' standing," is a line of decisions with the exception of the case of *Ransom and Randolph* v. *Evatt,* 142 O. S. 398, wholly inapplicable to this case.

This unjustified attempt on the part of the counsel for appellee to create the impression that we are now attempting to upset a body of law in effect over a long period of time runs throughout his brief.

Page 5, paragraph (l). The proportions of shipments of goods within Ohio and without Ohio have no bearing

on the location or situs of the accounts receivable involved herein. The court below assessed all the said receivables.

Page 8. "However, appellant's payrolls were made up and payroll checks were issued and drawn on appellant's bank accounts at each of appellant's respective plants and distributed to employees at the respective plants." Here, again, is a material omission of the fact that the balances maintained in Ohio all resulted from checks drawn on New York funds by officers in the New York office of the corporation (R. 52).

Pages 9, 10, 11. These pages are based in part upon an effort by appellee's counsel to argue from alleged "balance sheets" not in the record, and constitute an argument that, inasmuch as appellant owns a great deal of property in Ohio and ships a great deal of merchandise from its plant in Ohio, it should pay taxes on its accounts receivable, whether located in Ohio or not.

This argument of course has no validity as a situs argument and can easily be exposed as fallacious. All the property mentioned and all of the manufacturing described are subject to appropriate forms of taxation in Ohio in and of themselves and should not be regarded as having any bearing on the situs of separate intangible personal property not referable to Ohio.

Page 11, paragraph 1. "Orders were accepted by appellant for its products 'F. O. B. Shipping Points.' ". The stipulation is: "Prices are F. O. B. Shipping Points" (R. 54).

Page 11, paragraph 3. "Upon examination of appellant's records at the New York offices * * *" etc. The Commissioner in fact made no examination of appellant's records at the New York offices, and nowhere in the record does it appear that he did make such examination. Further, in this paragraph, there is another unjustified reference to prepaid items hereinabove discussed.

Page 11, paragraph 4. The stipulation specifically states that no sales were made of products out of inventory in Ohio (R. 57, Stipulation, paragraph 11).

Page 12, paragraph 2. There is no statement in the record that all of the accounts receivable were due within one year and no statement whatsoever with respect to notes. So far as the record shows, appellant owned no notes.

Page 21, discussion of the case of *National Cash Register Company* v. *Evatt*, 145 O. S. 597. The holding of this case is misstated in so far as it is said that "Accounts receivable resulting from a sale of property sold by an agent having an office in another state but filled from stocks of goods maintained in Ohio have a situs in Ohio for tax purposes." The holding of the court in fact was (quoting from the language of the court at page 605), "* * * Accounts receivable resulting from sales made within Ohio and sales made outside of Ohio, where the product was delivered from a stock of goods maintained in Ohio (for convenience called shipment sales) *and the avails thereof were used or intended to be used in the business, did have an Ohio situs for purposes of taxation.*" There the tax was a franchise tax.

Moreover, while the National Cash Register Company was a foreign corporation, nevertheless, the evidence in the case clearly showed a commercial domicile in Ohio since the manufacturing plant and executive and accounting officers were located in Dayton, Ohio. Thus the constitutional questions in the instant case were not present in the *National Cash Register* case.

Page 24, first paragraph. Erroneous statement as to "stock of goods maintained" in Ohio and "prepaid items." The reference to "prepaid items" recurs in paragraph (a) also on page 24.

Page 25, first paragraph. Here, again, is the argument attempting to ascribe an Ohio situs to the property of appellant because appellant owns other property in Ohio on which other taxes are paid.

Page 25, second paragraph. While the record does not disclose the proportions of goods delivered from the Ohio plant intrastate and interstate, it is stated that goods are shipped to points both within and without Ohio. The tax herein is on intangible personal property owned on tax listing date (January 1, 1944). Hence the proportions of all goods shipped intrastate as against those shipped interstate are not material to the issues.

Page 27, discussion of *Parke Davis & Company* v. *Atlanta.* Counsel fails to state the fact that the goods involved in sales in such case were shipped into the state and stored in warehouses in Atlanta from which sales and shipments were made.

Page 30, first two lines. Nothing appears in the record to the effect that appellant "consented" to an "apportionment" of the credits involved. The use of the word apportionment is misleading in this connection. Paragraph 12 of the stipulation (R. 57) is clear to the effect that it was stipulated only that 34.2191 per cent of all the accounts receivable for the calendar year 1943 arose from sales of products shipped from the Ohio plant and plant warehouses.

Page 31, discussion of *International Harvester Company* v. *Evatt,* 329 U. S. 416. This case is of course a franchise tax case and the only holding of the court was to the effect that the value of the privilege of doing business in Ohio could be measured by the value of all the products manufactured in Ohio irrespective of where the products were ultimately destined to be sold. Manufacturing of course is an intrastate activity and the franchise tax on the privilege of engaging in manufacturing was measured by the value of such privilege.

Page 35, second paragraph. Here again appears the conclusion that the tax is applied to the value of appellant's "credits in Ohio." Further in the same paragraph appears the statement that orders were filled from the stock of products maintained in appellant's Ohio manu-

facturing plant or warehouses. These statements are not supported by the record.

In the same paragraph appears argument to the effect that the sales were consummated by the appellant within Ohio after the acceptance of the contracts of sale outside Ohio. This is neither the fact nor the law. The contracts were made in New York, and did not specify any goods in Ohio.

Moreover, the tax herein is not upon the sale itself, but upon the property owned by the appellant which had no taxable situs in Ohio.

CONCLUSION

The judgment appealed from should be reversed, and judgment should be rendered for the appellant.

Respectfully submitted,

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